No. 20,415

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ERWIN E. HASSEN, *Appellant,*

vs.

SAM JONAS, *et al.*, *Appellee.*

APPELLEE'S PETITION FOR REHEARING.

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To the Honorable Stanley N. Barnes and Walter Ely, United States Circuit Court Judges, and J. Warren Madden, Judge of the United States Court of Claims:

Appellee Sam Jonas, as Trustee of the Estate of Pomona Properties, Inc., doing business as Steve's Ranch Market, hereby petitions for a rehearing to consider the judgment entered by this Honorable Court on February 3, 1967, on the following grounds:

I

As to the $28,000 transaction, the Opinion filed herein states that Appellant Erwin E. Hassen returned $8,000 and $14,000 to the bankrupt and later restored the remaining $6,000 plus an additional $2,000, and holds that

> "Where the person responsible for the fraudulent transfer has himself remedied the situation by returning the transferred property, the statutory purpose has been satisfied." (pp. 4-5 of Opinion filed February 3, 1967).

The vice of this analysis is that:

(1) The funds were "returned" surreptiously for the deliberate purpose of favoring certain creditors over

others, so that the general creditors were still deceived and thereby prevented from reaching the funds; and,

(2) The so-called restoration of funds did not remedy the harm caused by their fraudulent withdrawal.

The record shows that after Appellant Hassen wrongfully withdrew the sum of $28,000, he merely resorted to another "cover-up" by placing the money in an account carried in the name of Jack Goldsmith [See Trustee's Ex. M, pp. 138-142; Rep. Tr. pp. 238-242, 253]. Hence, Appellant Hassen did not truly and in good faith return the money; he merely continued to conceal it under another guise which prevented general creditors from attaching or otherwise pursuing it.

The question remains: Did the alleged payment by Appellant of certain debts repair the original damage. The answer properly must be in the negative, for the following reasons:

(a) Had Appellant not fraudulently taken $28,000 from the bankrupt in the first instance, such sum would have flowed into the hands of the Trustee and ultimately been distributed to unsecured creditors on an impartial prorata basis; indeed, had an attachment been made, the fund would have been preserved so as to permit the Trustee to vacate the levy and thus benefit the creditors of the estate.

(b) Without dispute, the "return" of the money did not benefit the bankrupt estate or the unsecured creditors generally—excepting only in an "indefinite fractional amount." (See p. 2 of Opinion).

(c) Since Appellant Hassen effectuated a fraudulent conveyance, the *burden* should repose solely upon him (not the Trustee) to establish that the damage thereby inflicted has been *fully and fairly rectified*—and no such proof was adduced here. To permit Appellant to fraudulently withdraw money, and then be deemed to

have "returned" it by paying selected creditors through a secreted bank account, frustrates the manifest purpose of the Uniform Fraudulent Conveyance Act, which is designed to prevent the very type of multiple manipulation which occurred here.

In other words, Appellee had the burden of showing that a violation of the Act had occurred. *But, that once having been established, the burden shifted to Appellant to demonstrate that he had fully repaired the harm.*

There was no credible proof, as this Court assumes, that Appellant repaid the money "indiscriminately" to creditors. *Due to Appellant's own derelictions, no adequate records existed to show whether the "restored" funds were or were not applied impartially.* Yet, having perpetrated the wrong, it became Appellant's duty to clearly demonstrate that such was the case.

(d) The fact, as was apparently relied upon in part by the Opinion herein (p. 4), that the Trustee failed to show he had pursued or recovered these payments as improper preferences on behalf of the bankrupt estate, vests no rights in Appellant. First, the records of the bankrupt were virtually incomprehensible or nonexistent (see p. 3 of Opinion), so that a large share of the funds could not be specifically traced; second, not only were there no definite records of the amount allegedly paid to the utility companies—this payment was obviously made by Appellant for the self-serving purpose of seeking to shield himself from a charge of embezzlement (*i.e.,* the distribution by Appellant was not truly "indiscriminate" as p. 4 of the Opinion indicates); third, the payment to McDaniel's Markets effectively placed the funds beyond the reach of the Trustee, since such recipient itself was in due course involved in a Bankruptcy Court proceeding; fourth, there is no assurance that any such preference could have been set aside by the Trustee, since to be voidable the creditor must be shown to have had reasonable cause

to believe the debtor was insolvent and other particular requisites must be satisfied (Bankruptcy Act, Sec. 60, subdiv. b). In brief, Appellant's tortious withdrawal was made at the risk that his subsequent acts would not undo the original injury—and they did not do so.

The Opinion states that a torture was imposed upon the statute and that Appellant was made to pay a "penalty" (p. 6).

Appellee strenuously disagrees: the effect of this Honorable Court's decision is to inflict a penalty upon the general creditors of the estate, who by Appellant's admittedly fraudulent conduct were deprived of the fruits which an honest course of dealings would have produced.

The test on this appeal is whether the Referee committed clear error. Appellee is entitled to the benefits of not only all facts in the record, but all inferences which may be fairly deduced therefrom. When viewed in this light, the evidence shows that Appellant's entire pattern of conduct was fraudulent, and there is ample support for the Referee's specific finding that

> "Respondent [Hassen] knew and had reasonable cause to believe that such funds would be so expended [*i.e.*, prior to initiation of bankruptcy court proceedings and in such manner that general creditors would not benefit] at the time he returned same to the Bankrupt." (Par. IV, p. 14 of Findings of Fact filed December 11, 1964).

Thus, this Honorable Court appears to have decided the case on the basis of the bare-bones fact that Appellant withdrew and "returned" the money—without due consideration for the bad faith nature of the alleged restoration and its lack of any significant benefit to the general creditors. The scope of this review requires as a matter of law that the Court accept all the evidence in the record which impeaches Appellant's claim of relief.

II

The Court erred in not following the prevailing California law as stated in *Hickson v. Theilman,* 147 Cal. App. 2d 11, 304 P. 2d 122 (1956).

In that case, plaintiffs sued to annul certain fraudulent transfers made by defendant to his co-defendant children to avoid an execution under a judgment. Defendant contended on appeal that his daughter had returned $1,500.00 and that, accordingly, it was an error to hold her liable. The Court stated that if the daughter conspired with the others to defraud the plaintiffs, and received the money with that intent and purpose, returning the money to defendant would not have relieved her of responsibility.

The circumstances in this case are indistinguishable from *Hickson, supra.* Appellant Hassen conspired with Jack M. Goldsmith and the bankrupt, his *alter ego,* to obstruct creditors by concealing funds from the bankrupt. Once these funds had been removed, Appellant's fraudulent purpose of evading the creditors had been accomplished. "Returning" the money by paying certain other creditors in no way remedied the wrong which Appellant had accomplished as to Orange Empire, Steve Dadigan, and other unsecured creditors. Therefore, Appellant Hassen did not remedy the situation.

Wherefore, Appellee respectfully requests that this Petition for Rehearing be granted and the judgment of the District Court be affirmed in full.

Respectfully submitted,

BUCHALTER, NEMER, FIELDS & SAVITCH,

By BENJAMIN E. KING,
ROBERT H. THAU,

Attorneys for Appellee Sam Jonas, Trustee.

Certificate.

Undersigned counsel certify that this petition is not interposed for delay and that in their judgment it is well founded.

Dated: March 3, 1967.

BENJAMIN E. KING

ROBERT H. THAU

Attorneys for Appellee